SUPREME COURT OF APPEALS OF VIRGINIA.

RICHMOND.

PRICE, AUDITOR, v. SMITH*.

April 9, 1896.

1. MANDAMUS—*Jurisdiction of Court of Appeals—Writ of error—Matters not merely pecuniary.* The Court of Appeals has jurisdiction under Art. VI, Sec. 2, Const. of Va., and the laws passed in pursuance thereof, of writs of error in proceedings by *mandamus*, although the amount involved is less than five hundred dollars. A *mandamus* in a proper case always involves some matter not merely pecuniary. The Constitution does not *proprio vigore* confer the jurisdiction, but Sections 3454 and 3455 of the Code carry into effect the constitutional provision.
2. JAILER'S FEES—*Heating jail.* It is the duty of the jailer to provide fuel to warm the jail when necessary, and the cost thereof is to be paid by him. The *per diem* for board of prisoners is fixed by statute and covers this expense. The board of State prisoners is paid out of the State treasury, but that of the prisoners charged with the violation of the ordinance of any city or town, or taken on a *capias* for failure to pay a fine imposed for a violation of such ordinances, is at the same rate as for State prisoners and is payable out of the treasury of such city or town.

Error to a judgment of the Corporation Court of the city of Alexandria, rendered December 4, 1893, in a proceeding by *mandamus*, wherein the defendant in error was the plaintiff, and the plaintiff in error was the defendant. *Reversed.*

The opinion states the case.

Samuel G. Brent, for the plaintiff in error.

A. W. Armstrong and *F. L. Smith*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

The first question to be determined is the right of this court to take jurisdiction by writ of error in a *mandamus* proceeding, where the amount involved is less than $500. It is insisted that the matter in controversy is merely pecuniary, and, being for a sum less than $500, there can be no writ of error.

Section 2, Art. 6, of the Constitution of Virginia, in declaring the jurisdiction of this court, says it shall have appellate jurisdiction only, except in cases of *habeas corpus*, *mandamus*, and *prohibition*. The

* Reported by M. P. Burks, State Reporter.

Constitution regulates the character of the jurisdiction, whether original or appellate, which this court may exercise, and restricts the power of the legislature so as to prevent it from conferring original jurisdiction of any other character; but that jurisdiction, whether original or appellate, must still be regulated by law. The legislature must carry into effect the constitutional provision by appropriate enactments. The Constitution does not, *proprio vigore*, confer jurisdiction upon this court, and therefore whatever jurisdiction it exercises must be by virtue of statutory authority made in pursuance of the Constitution. *Barnett v. Meredith*, 10 Gratt. 650; *Page v. Clopton*, 30 Gratt. 417; *Gresham v. Ewell*, 84 Va. 784.

The legislature has, from time to time, enacted appropriate legislation touching the matter of the jurisdiction of this court.

Sections 3454 and 3455 of the Code of 1887, taken together, provide in what cases petition for appeal, writ of error, or *supersedeas* may be presented. Section 3454, by itself, would give jurisdiction to this court in every case; but this power is limited by section 3455, which provides in what cases such right of appeal, writ of error, or *supersedeas* is prohibited.

Section 3454, therefore, secures the right to a writ of error in the case at bar, unless it is prohibited by sec. 3455. This section prohibits an appeal where the petition is presented more than one year after the final judgment or decree, where the judgment complained of is rendered by a county or corporation court on an appeal from a Justice, and where the judgment or decree or order of any other court is for a matter less in value than $500, exclusive of costs, unless there be drawn in question a freehold or franchise, or the title or bounds of lands, or some matter not merely pecuniary. The words, "or some matter not merely pecuniary," which appear in the Act, are not found in the Constitution. Hence, those words, as used in the statute, mean only such "matters not merely pecuniary" as are enumerated in the Constitution.

Among the "matters not merely pecuniary" enumerated in Art. 6, sec. 2, of the Constitution, as to which jurisdiction is conferred upon this court, are cases of *mandamus*.

The Court of Appeals is invested with original jurisdiction to award the writ of *mandamus* in all cases, without regard to the amount involved; and it would be remarkable if the legislature intended to prohibit review, or not allow it, in cases of *mandamus*, where the court below, in the exercise of its jurisdiction, has erred.

The writ of *mandamus* is an extraordinary remedy, never permissible where any other proceeding is adequate. It always involves some matter not merely pecuniary—otherwise one of the ordinary remedies would suffice—and most frequently some question of public importance. For this reason, no doubt, the framers of the Constitution thought it wise to confer upon the court of last resort jurisdiction in all such cases; and the legislature has carried this constitutional provision into effect, by providing that there may be an appeal, writ of error, or *supersedeas* in cases where there is drawn in question some matter not merely pecuniary—referring, as already stated, only to such matters not merely pecuniary as are enumerated in Article 6, sec. 2, of the Constitution.

The Corporation Court of the city of Alexandria entered an order allowing an account in favor of the sergeant of said city, who is *ex officio* its jailer, amounting to $162.96, for fuel furnished the city jail, and ordered the same to be certified to the auditor of the city for payment. The auditor referred the matter to the city council, and that body refused to allow the account to be paid. Thereupon the sergeant presented his petition to the Corporation Court of the city of Alexandria praying for a *mandamus*—which was awarded—to compel the auditor to draw a warrant on the treasurer of the city, in favor of the petitioner, for the sum of $162.96, in payment of the account.

The question presented is, whether or not there is any authority of law for requiring the city of Alexandria to furnish the jailer of that city with the fuel used in its jail.

It is insisted that this charge is imposed upon the city by authority of the general law found in the Code prescribing the duties, and providing the compensation, of the jailer.

Section 928 of the Code provides:

"The jailer shall cause all the apartments of his jail to be well whitewashed, at least twice in every year, and have the same properly aired and always kept clean. He shall furnish every prisoner with wholesome and sufficient food, and with a bed and bedding, cleanly and sufficient, and have his apartments warmed when it is proper. In case of sickness of any prisoner, he shall provide for him adequate nursing and attendance, and if there be occasion for it, and circumstances will admit, shall confine him in an apartment separate from other prisoners. In no case shall a jailer permit the intemperate use of ardent spirits in his jail."

The only compensation allowed by law to the jailer for the performance of the duties prescribed in sec. 928 is found in sec. 3532 of the Code, which provides as follows:

"For receiving a prisoner in jail when first committed twenty-five cents, for

keeping and supporting him therein, for each day, forty cents, and when there are as many as three and less than ten prisoners, thirty cents for each per day, and when there are ten or more persons in jail, for each twenty-five cents per day."

These statutes clearly prescribe the duties of the jailer, and, with equal clearness, provide what his compensation shall be for discharging those duties; and nowhere do we find authority for holding that it is the duty of the city to furnish the fuel necessary to cook for the prisoners, or to keep them warm. On the contrary, it is expressly provided that the jailer shall furnish every prisoner with wholesome and sufficient food, and have his apartments warmed when it is proper; and the only compensation therefor is provided, as already stated, by section 3532.

If the legislature had intended to provide that the jailer should be furnished with the fuel to keep the jail warm, it would have said so in plain and explicit language; for, in other instances where it was intended to furnish prisoners with comforts or attention not required of the jailer, it is expressly so declared, as in section 4079, which makes provision for the payment of medical attendance and clothing furnished prisoners. The jailer might ask the court to pay for lights, servants' hire, or food, with as much propriety as he can demand payment for the fuel used in warming the jail.

Under section 3532 of the Code, the cost of keeping and supporting prisoners in jail is paid by the Commonwealth; it being there provided that the fees of sergeants and sheriffs, who are *ex officio* the jailers, shall be paid out of the treasury. This section has been amended by an Act passed February 24, 1390 (Acts 1889–90, p. 79), so as to provide that "no payment shall be made out of the treasury for receiving, keeping and supporting any prisoner committed to jail for a violation of the ordinances of any city or town, or who is in jail under a *capias pro fine* issued for a failure to pay a fine imposed for a violation of such ordinances."

The account, payment of which is demanded of the city of Alexandria, is for fuel used in the jail from April 10, 1892, to May 19, 1893. The record does not show what proportion of the prisoners, if any, in jail during that time, were committed for violation of city ordinances. There could have been no charge upon the city for the support of any of the prisoners, except such as were there for the violation of its ordinances, and as to them the jailer could only receive such compensation as is provided by law.

It follows, that it was error in the Corporation Court to award the

mandamus prayed for, and its judgment must therefore be set aside, and this court will enter an order dismissing the petition for the writ.

Reversed.

BY THE EDITOR. If the reader will carefully compare the provisions of the several Constitutions of Virginia on the judicial department of the government, beginning with that of 1776 and ending with the present Constitution, he will find that the regulation of the exercise of judicial power within the limits prescribed by the Constitution was always left to the legislature. By the Constitution of 1851 it was declared, for the first time, in what *classes* of cases respectively the Supreme Court of Appeals should have original and appellate jurisdiction; but, it was decided in *Barnett v. Meredith*, 10 Gratt. 650, and again in *Page v. Clopton*, 30 Gratt. 417, that legislation was necessary to the exercise of the jurisdiction conferred. Hence, although under the Constitution of 1851 the Court was invested with original jurisdiction of cases of *mandamus*, yet the jurisdiction could not be exercised by the court in that case because the legislature had not provided for such exercise. In this particular the Constitution of 1869 (the present Constitution) is the same as that of 1851. And the same principle applies to the exercise of appellate jurisdiction, as the decided cases show.

Sections 3454, 3455, of the present Code were framed on the corresponding sections of the Code of 1849, and subsequent amendatory Acts, and the language "unless there be drawn in question . . . some matter not merely pecuniary" appears in all of the statutes. After the adoption and ratification of the Constitution of 1851, it might have been more appropriate to change the phraseology of the statute so as to conform literally to that used in the Constitution; but it was not deemed necessary, as the language used in the statute was substantially the equivalent of that used in the Constitution. This has been the construction for more than forty years.

Since the exercise of jurisdiction, original and appellate, by the Court of Appeals in cases of *mandamus* may, under the Constitution, according to the decisions, be regulated by the legislature, would it not be judicious by legislative Act to limit the exercise of the original jurisdiction?

As the law now stands (sec. 3086 of the Code) it seems that the court may, in addition to the cases particularly specified, issue the writ of *mandamus* "in all other cases in which it may be necessary to prevent a failure of justice." The language just quoted was taken by the legislature substantially from Lord Mansfield's opinion in *Rex v. Barker*, 3 Burr. 126 (*Page v. Clopton, supra*, at p. 418), a *mandamus* case, and was clearly intended to be confined to the writ of *mandamus* and does not include the writ of *prohibition* mentioned in the same section of the Code. See what is said by Lewis, P., speaking for the court, in *Gresham v. Ewell. Judge*, 84 Va. at p. 785. Under this section the Court of Appeals is liable to be crowded with many cases that might as well be confined to the circuit and corporation courts as now constituted. The suggestion is, that the awarding of the writ of *mandamus* by the Court of Appeals in the exercise of its original jurisdiction should be confined to cases of great public importance, leaving cases of minor importance to originate exclusively in the inferior courts; and a like limitation should, perhaps, be placed on the exercise of the appellate jurisdiction. We hope that the legislature at its next session will take this matter into consideration.